No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,
Appellant,

vs.

HELENA GAS AND ELECTRIC CO., a corporation,
Appellee.

Reply Brief of Appellant

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Reply Brief of Appellant

Appellant here replies to the argument advanced in appellee's brief.

BROKEN OR FALLEN WIRES

a. (Specific Allegations)

At page 2 of its brief appellee insists that the complaint charges negligence in *specific* and not in general terms.

At page 4 appellee says, "the only negligence charged, is that the defendant negligently, carelessly and recklessly allowed and permitted a broken wire, charged with high electric current, *to be* and *remain* upon a public sidewalk." (Italics ours.)

We do claim that defendant was negligent in allowing the charged wire "*to be* and *remain* upon a public sidewalk." A simple turning of a switch or lever, by defendant's operator at its plant, would have turned off the current and immediately rendered the dangerous charged wire, dead and harmless.

It was defendant's duty to not permit the charged wire "to be and remain" upon the public sidewalk after it had notice of the existence of the dangerous condition. It was defendant's duty to first turn off the current and next to remove, from the public sidewalk, the wire in question.

This duty defendant should have performed first at 10:26 P. M., when notified by Mr. Cummings (R. pp. 99, 47),—next between 10:26 and 10:50 P. M. when notified by some one (R. p. 99) and third, at 10:50 P. M. when defendant's automatic device registered trouble (R. p. 88).

Defendant's negligence and failure to perform this duty subsequently resulted in the injury to plaintiff at 11:20 P. M.

In 20 Corpus Juris, Section 43, p. 357, it is said:

> "Where an electric company receives notice that a wire is down in the street *it should instantly turn the current off and keep it off till proper precautions are taken to prevent danger to persons* or property from the fallen wire, and until it is ascertained that it is safe to turn it on." (Italics ours.)

Had the defendant performed its duty as above, the plaintiff would not have been injured.

Clearly there is substantial evidence shown by the record herein which would warrant a jury in finding that the defendant was negligent in permitting the charged wire "to be and remain" upon the public street for the period of approximately an hour after it had received actual notice of the dangerous condition.

b. (General Allegations)

At page 33 of our former brief attention was called to the fact that when it came to making its record and presenting its defense, defendant was not content to consider the complaint as containing a single *specific* act of negligence.

At pages 26 and 27 of its printed brief, appellee explains its double position in this fashion:

> "However, in view of the conflict in the authorities * * * and of plaintiff's contention at the trial that the complaint did contain a general charge of negligence upon which they relied, *it was considered a safer practice for the defendant not to rely solely on the defense*

> *that plaintiff had failed to prove the specific negligence charged.* Such practice was especially justified in this case as defendant was able to show standard equipment in its wires, cross arms, etc., and also that the breaking of the wire was due to an act of God." (Italics ours.)

As was aptly said in the recent California case of Martin v. Pacific Gas & Electric Co. (1928) 264 Pac. 246 at p. 248:

> "Counsel for defendant, having taken this position of weakness, undertook with great skill to turn it into a position of strength."

In the Martin case, supra, as here, the defendant, by an admission tendered, sought to limit the evidence to one *specific* ground, viz: "that the defendant negligently permitted the electric power wire 'to remain' on the ground" (264 Pac. at p. 251). The trial court declined to confine the proof to such narrow limits, holding that the complaint charged negligence in maintaining the wire as well as in failure to remove it from the sidewalk after it became broken.

At page 249 of the opinion it said:

> "With this construction of the pleading on the issue of negligence, practically all of the contentions of appellant, one by one must fail. For example, the admission indulged by it, which undertook to limit the proof, becomes an admission of only one of the two or more specific acts of negligence alleged to have

> proximately contributed to plaintiff's injuries. Such an admission not only did not authorize the court to limit the evidence, but in reality it would have been error if the court had undertaken to so limit it. Williamson v. Atlas Power Co., 212 App. Div. 68, 208 N. Y. S. 301. This construction of the pleading makes also free from error the act of counsel for plaintiff in referring to all the issues on negligence in his opening statement. This same observation is true with reference to the marshaling and introduction of evidence to prove each of the specific acts of negligence alleged in said paragraph."

The first case cited by appellee in its brief (Br. p. 10) is Aument v. Penn. Telephone Co., 28 Pa. Super. 610. Obviously the case is not in point.

The later case of Zinkiewicz, 53 Pa. Super. 572, decided by this same Superior Court, is very much in point in view of the holding that an electric light company,

> "would be responsible for the consequences of permitting a live wire to dangle upon the road after notice, actual or constructive, *regardless of the causes producing such a condition.*" (Italics ours.)

ORDER OF PLAINTIFF'S PROOF

At pages 3 and 4 of its brief, appellant calls attention to certain objections made to evidence offered by plaintiff in his *Case in Chief* relating to defective conditions of the wire in question.

These objections were sustained upon the grounds that the evidence was prematurely offered.

Plaintiff recognized such evidence was more properly rebuttal and the court likewise adopted this view. (R. p. 36. Also appellee's brief p. 4.)

The case of Johnson v. Grays Harbor R. & L. Co., (Wash.), 253 Pac. 819, quoted from by appellee at pages 15 and 16 and cited again at page 36 of its brief, the court said at p. 820:

> "It is conceded that, when appellant's evidence showed that the death resulted from contact with a live wire which had a loose end lying in a public street, *a prima facie case was made, and that respondent must then assume the burden of showing that the result was not caused by its own negligence.*" (Italics ours.)

Clearly, after the defendant assumed "the burden" and introduced evidence of standard equipment, "act of God," etc., it was proper for plaintiff to then offer evidence in rebuttal thereof, which plaintiff did without objection from the defendant.

This contradictory evidence so introduced, on the issues in the case, made it the duty of the court to submit the case to the jury, whose province it was to reconcile conflicting statements.

SPARKING WIRES

Flashes occasioned by escaping electricity on defendant's line in the vicinity where plaintiff was injured was observed by seven different witnesses.

These flashes began about 10:26 P. M., when first observed by Mr. Cummings, and continued until plaintiff was injured at 11:20, when defendant finally turned off the electric current.

"Sparking" wires and defective insulation had been previously observed at or in close proximity to the point where the wire broke. There were only five wires on the defendant's line and it was the business of the defendant and not the business of the plaintiff or those reporting the trouble to ascertain or know what particular wire "was sparking."

On defendant's motion for a directed verdict plaintiff is entitled to the benefit of every fair inference which might reasonably be drawn by the jury from the evidence.

It is not unreasonable to infer that there was some defect which caused the wire to "spark,"—that there was some defect which caused one wire to break and fall while the other four remained intact and in place and that the defective "sparking" wire was the one which did the injury to plaintiff.

The law does not require the injured plaintiff to identify, specify, point out and number a certain wire which "sparked" at the place where he was injured as the one with which he came in contact.

See:

45 Corpus Juris, section 652, pp. 1082-1084.

RES IPSA LOQUITUR

So far as the particular issues in the present case are concerned, it is immaterial whether the doctrine of res ipsa loquitur is or is not applicable.

In a case such as is shown by the record herein, quoting the language of Wallace v. United States, 16 F. (2d) 309 at page 312, "No confirmation is needed by application of the rule of res ipsa loquitur."

Among the authorities cited in the Wallace case, *supra,* in support of the above, is the case of Lucid v. Dupont (C. C. A. 9th), 119 Fed. 377, from which appellee quotes on page 37 of its brief.

See also:

Smith v. Redman, (1927), 244 Ill. App. 434.

STANDARD EQUIPMENT

It is true defendant attempted to show that its equipment was standard but there was considerable substantial evidence introduced on behalf of plaintiff to the effect that the insulation was defective and worn (R. p. 86),—that there was no fuse on the circuit (R. p. 87),—that no inspection had been made for some two years (R. p. 84),—that the construction and equipment "was the poorest construction I have ever seen" (R. p. 112),—that the type of construction used is dangerous and that by reason thereof Helena is known among electricians as a "hot town" (R. p. 112).

This conflicting evidence presents questions of fact which are to be determined by a jury.

ACT OF GOD

In its answer defendant pleaded an "unprecedented wind and storm" (R. p. 12).

In our brief we adopted defendant's language and pointed out the fact that there were at least *three precedents* for the storm in question (R. p. 57).

In appellee's brief it prefers the use of the phrase an "act of God" to the more clearly defined term of unprecedented storm.

In the first place the evidence falls far short of showing an "act of God."

As was said in Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374:

> "The term act of God in its legal sense applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."

In 1 Corpus Juris, section 2, p. 1174, it is said:

> "The principle embodied in all of the definitions is that the act must be one occasioned exclusively by violence of nature and *all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from ac-*

tive intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God. Thus if a party is in default for not performing a duty or not anticipating a danger, or where his own negligence has contributed as the proximate cause of the injury complained of, he cannot avoid liability by claiming that it was caused by an act of God. If divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge from liability." (Italics ours.)

See also:

London Guarantee & Accident Co. v. Industrial Acc. Com'n, (1927 Cal.), 259 Pac. 1096

Rocca v. Tuolumne County Elec. Power & Light Co., 76 Cal. App. 569, 245 Pac. 468

Gans S. S. Line v. Wilhelmsen, (C. C. A. 2d), 275 Fed. 254

U. S. v. K. C. So. R. Co., 189 Fed. 471

Gleeson v. Virginia Midland R'D Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458

In the second place, even though the storm in question had been of such character as to come within the definition of an "act of God" still the question as to whether the injury to plaintiff was caused by an "act of God" or whether it was caused by the negligence of defendant, presents a question of fact *to be determined by the jury.*

In Lewis v. Harvey, 101 Kan. 673, 168 Pac. 856, the defendants pleaded an "act of God" as a defense. The court said at pp. 857, 858:

> "This particular accident would not have happened if there had been no flood; neither would it have happened if the wires had been so arranged that they could not fall on each other. (Citing and quoting from 1 C. J. 1174.)
>
> * * * * * *
>
> "See, also, The Law of Electricity, by Curtis, secs. 454, 455; 4 R. C. L. 715-717.
>
> "An 'act of God' as known in the law is an irresistible superhuman cause, such as no reasonable human foresight, prudence, diligence, and care can anticipate and prevent. (Citing authority.)
>
> "Was Frank Lewis killed by an 'act of God'? *Under the evidence, that question was for the jury to answer.*" (Italics ours.)

In Johnson v. Grays Harbor R. & Light Co. (1927 Wash.), 253 Pac. 819, cited and quoted from in appellee's brief, the court said at p. 821:

> "Other instructions were excepted to upon the ground that they submitted to the jury the issue of whether the act of God was responsible for the accident. *Since we have held that the issue was properly before the jury,* these assignments of error are thus disposed of." (Italics ours.)

Appellee, on the last page of its brief (Br. p. 39), asserts that:

> "the evidence in support of defendant's defense of an act of God shows that the breaking of the wire was *probably* due to this extraordinary wind storm and *destroys any presumption of negligence that otherwise might have existed under such doctrine. So there was no question for the jury even on the theory that the complaint contains a general charge of negligence.*" (Italics ours.)

The above argument was set at rest and determined by the United States Supreme Court, adversely to appellee's contention, no less than 38 years ago.

In Gleeson v. Virginia Midland R'D Co., 140 U. S. 435, it was contended that the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. At page 444 of the opinion, Mr. Justice Lamar, speaking for the court, said:

> "Neither of these attempted distinctions is sound, * * * * *
>
> "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that

the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. *And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.*" (Italics ours.)

CONCLUSION

The Seventh Amendment to the United States Constitution provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

In Robestelli v. N. H. & H. R. Co., 33 Fed. 796, which was a negligence action, the court said at page 801 of the opinion:

> "*The plaintiff had the right to have all these questions of fact passed upon by the jury.* This right was guaranteed to her by the supreme law of the land in the eighth (seventh) amendment to the constitution. And this right involved, not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established." (Matter in parentheses inserted. Italics ours.)

In 20 R. C. L., sec. 141, at pages 169 to 171, it is said:

> "*The right of a party to have the jury pass upon the question of liability becomes absolute where the facts are in dispute and the evidence is conflicting, or when the proof discloses such a state of facts that, in essaying to fix responsibility for the injury or damage, different minds may arrive at different conclusions.* The question of the defendant's liability lawfully can be withdrawn from the jury and determined by the court as a question of law, when and only when the facts are undisputable, being stipulated, found by the court or jury, or established by evidence that is free from conflict, and when the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it. But the fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered." (Italics ours.)

The instant case should have been submitted to the jury. It was error in the court to deny plaintiff his constitutional right of trial by jury. It was

error to direct a verdict for defendant. For these reasons the cause should be reversed and remanded for a new trial.

Respectfully submitted,

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